IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.29 OF 2001

Gerard Tschappat,
presently lodged at
Central Jail, Aguada,
Sinquerim, Bardez,Goa ... APPELLANT

versus

State of Goa,
as represented by
Officer-in-charge,
A.N.C. Police Station,
Police Headquarters,
Panaji, Goa ... RESPONDENT

Mr. Lalit Chari, Sr. Advocate, with Mr. J.P.D'Souza and Mr. Francis Saldanha, Advocates, for the Appellant.

Mr. A.P. Lawande, Public Prosecutor, for the Respondent.

CORAM : P.V. KAKADE, J.

DATED : DECEMBER 5, 2002.

JUDGMENT

The Appellant has preferred this Appeal against Judgment and Order passed by the Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No.8 of 2000 wherein the Appellant was convicted for offence punishable under Section 21 of the N.D.P.S. Act 1985 and was sentenced to undergo Rigorous Imprisonment for 10 years and to pay fine of Rupees One Lakh or in default to

undergo another 6 months Simple Imprisonment. The detention period as undertrial was directed to be set off under Section 428 of the Cr.P.C..

2. The facts giving rise to the case, in short, are thus:

The Appellant, a Swiss National, was found possessing 7 grams of heroine, between 00.15 hours to 2.40 hours in Municipal Garden in front of Hindu Pharmacy, Panaji, Goa on 8.1.2000 by P.S.I. of A.N.C. Police Station. This seizure was consequent upon the information received by PSI Prabhudessai at 22.40 hours on 7-1-2000. The telephonic message was given and the said information was reduced to writing and was sent accordingly to his superior Officer. The raid was conducted according to law in presence of panchas and seizure was made after compliance of the provision of Section 50 of the N.D.P.S. Act.

After the seizure, the sample of the narcotic was duly sealed and was eventually sent to the Chemical Analyser whose report was received in due course which was positive and on such basis, on completion of investigation, the charge-sheet was sent to the Special Court.

The learned Special Judge framed charge against the Appellant/accused to which he pleaded not guilty. The prosecution led its evidence and on completion thereof, the learned Special Judge came to the conclusion that the substance found in the custody of the Appellant was heroine and the prosecution had proved the offence contemplated under Section 21 of the N.D.P.S. Act against the Appellant/accused. It was further held that the plea of the accused that the quantity found with him was "small quantity" within the meaning of provision of Section 27 of the N.D.P.S. Act was negatived and, as such, benefit of Section 27 of the said Act was denied to the Appellant. Consequently, the Appellant was convicted and sentenced accordingly and hence the Appeal.

3. I heard Mr.Chari, the learned Senior Counsel, as well as Mr. J.P. D'Souza, the learned Counsel for the Appellant. I also heard Mr.Lawande, the learned Public Prosecutor, at length and perused the entire record with their assistance.

4. In the course of the arguments, the learned Counsel for the Appellant brought to my notice that it is the prosecution case that the

contraband article found in possession of the Appellant was less than 7 grams. The evidence of the Chemical Analyser also shows that when he opened the envelope containing the contraband and weighed the contents in the envelope, the contents were weighed at 6.20 grams of creamish powder and the entire weight of the contraband along with the bag where it was kept, was 7 grams. In view of this position, the learned Counsel for the Appellant submitted that the learned trial Judge should have given serious consideration for their plea for benefit of Section 27 of the N.D.P.S. Act to hold that it was "small quantity" contemplated under the provisions of the said Act and the Rules thereunder. It may be noted at this stage that the small quantity envisaged by the provision of Section 27 of the said Act is that of 5 grams and, therefore, it must be said that this case is a borderline case.

5. Mr. Lawande, the learned Public Prosecutor, brought to my notice that the contraband found with the Appellant was more than quantity of 5 grams and, therefore, technically it could not be said to be "small quantity" within the meaning of Section 27 of the said Act. In this regard, the learned Counsel for the Appellant

invited my attention to the unreported ruling of the Division Bench of this Court in Criminal Appeals No.8 of 1991 and 9 of 1991. In a similar situation, the Division Bench of this Court observed thus:-

> " We are conscious that small quantity has been defined to be 5 gms. and what is apprehended from accused Marco is 7.240 gms. of substance containing charas. Nevertheless, there is no indication whatsoever that the accused Marco is a drug pedlar. It is common knowledge that foreigners come here and they are either drug addicts or enjoy themselves with drugs. The fact none-the-less remains that what was finally recovered from him is slightly in excess of the small quantity as defined by the notification issued by the Central Government. In the absence of any indication that he is a peddlar and regard being had to the stringency of penalty we feel that the circumstances of the case will justify that his conviction be upheld for possession a small quantity and therefore he is liable to be punished under Section 27 of the Act instead of Section 20(b)(ii) of the Act."

In my considered view, the ratio applied by the Division Bench in the said Appeals can equally be adopted in this case. Here, the Appellant is found possessing contraband articles

weighing 6.20 grams whereas in the case under consideration of the Division Bench earlier, the quantity held by the Appellants there was 7.240 grams. In this case also the Appellant is a Swiss National and, obviously, there is absolutely no indication to hold that he is a drug peddlar. It is common knowledge that foreigners come here and they are either drug addicts or enjoy themselves with drugs. Thee facts involved do show that what was finally recovered from the Appellant is slightly in excess of the "small quantity" as defined by the Notification issued by the Central Government. Therefore, in the absence of any indication that he is a peddlar and regard being had to the stringency of the penalty, I feel that the circumstances of the case would justify that his conviction be upheld for possessing small quantity and therefore, he would be liable for punishment under Section 27 of the Act instead of Section 21 of the Act.

It is also brought to my notice that the Appellant is in custody since 8-1-2000, i.e. almost 3 years. The provision of Section 27(a) provides for imprisonment for a term which might extend for one year or with fine or with both. Mr. D'Souza, the learned Counsel for the Appellant,

submitted that the benefit of Section 27 to the Appellant should entail his immediate release holding that the imprisonment already undergone was sufficient to cover his conviction and sentence. Mr. Lawande, the learned Public Prosecutor, insisted that the Appellant should be made to pay fine instead of giving benefit of shorter sentence in default of payment of fine. Mr. D'Souza, the learned Counsel for the Appellant, agreed that the Appellant will deposit the fine amount which would be directed by this Court, provided his substantive sentence is reduced to which already undergone by him.

6. In view of these facts and circumstances, I pass the following Order:-

The Appeal is partly allowed. The conviction and sentence passed by the learned trial Judge under Section 21 of the N.D.P.S. Act is hereby set aside and instead, the Appellant is convicted under Section 27 of the N.D.P.S. Act and is directed to undergo imprisonment for the period which he has already undergone and to pay fine of Rs.50,000/-, in default, to undergo Rigorous Imprisonment for 3 months. On payment of fine, the Appellant would be entitled to immediate release

from the prison holding that he has undergone the sentence as directed by this Court, if not required in any other case.

P.V. KAKADE,J.

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